(4) No. 08-1479

Supreme Court, U.S.
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In The Supreme Court Of The United States

PFIZER, INCORPORATED,

Petitioner,

v.

JAMES D. DOTSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Introduction

Respondent Dotson's Brief in Opposition to Pfizer's Petition for Certiorari ("Res. Br. Opp.") parrots the erroneous rationale underlying the Fourth Circuit's decision. By ignoring the significant differences between a prescriptive claim versus a claim for retaliation, which involves a violation of proscriptive rights, both the Fourth Circuit and Dotson have eliminated the "intent" element necessary to state a claim for retaliation under the FMLA. Because the Fourth Circuit improperly conflated the elements of Dotson's prescriptive claim with the fundamentally different elements of his separate retaliation claim, the decision below creates a serious split among the circuits.

Moreover, the Fourth Circuit's reliance on evidence of pretext where Dotson had failed to prove a *prima facie* case creates another split between the circuit courts. Dotson's Response repeats the Fourth Circuit's mistake by focusing on a pretext analysis when the record is barren of facts that can satisfy one of the *prima facie* elements for a FMLA retaliation claim: knowledge by Pfizer's decision makers that Dotson had exercised FMLA rights.

For these reasons, the Court should grant Pfizer's Petition to resolve the serious circuit splits created by the Fourth Circuit's decision.

1. Dotson's Response ignores the circuit split caused by the Fourth Circuit's decision to conflate prescriptive and proscriptive rights.

Dotson never asked for FMLA leave.[1] Nor did the decision makers have knowledge of Dotson invoking rights under the FMLA. Thus, the simple question presented is whether Pfizer's decision makers could form an intent to retaliate against an employee for exercising FMLA rights where the employee did not exercise or invoke the FMLA. Based upon all other circuit decisions acknowledging the difference between prescriptive and proscriptive rights, as well as generally accepted principles that apply to other federal employment retaliation statutes, Pfizer decision makers could not have formed a retaliatory intent under these circumstances. Pfizer's Petition for Certiorari at 14-18, 22-26.

Dotson spends much of his Response citing authority for the proposition that employees do not need to expressly invoke the FMLA to gain some measure of protection under the FMLA. Res. Br. Opp. at 18-19. Thus, if an employer has knowledge of an employee's need to take leave for an FMLA-qualifying event, the employer is strictly liable for violating an employee's *prescriptive* rights. This

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[1] Dotson did take intermittent vacation to complete an adoption. This event might have been counted against Dotson's FMLA leave complement if Pfizer had designated the intermittent vacation as intermittent FMLA leave and Dotson had consented to the designation. *See* 29 U.S.C. § 2612(a)(1)(B), 29 U.S.C. § 2612(b)(1).

includes the right to twelve weeks leave and the right to reinstatement at the end of the leave. *See* 29 U.S.C. §§ 2612, 2614. The intent or good will of the employer is irrelevant when it comes to an employee's prescriptive rights. *Strickland v. Water Works & Sewer Rd.*, 239 F.3d 1199, 1208-09 (11th Cir. 2001).

However, Dotson fails to acknowledge that the authority he cites applies to prescriptive rights, not proscriptive protections. The FMLA regulatory scheme is designed to administer employees' leave rights under the FMLA, not to eliminate or change the intent requirement fundamental to all retaliation claims, including FMLA retaliation claims. The Fourth Circuit erred in superimposing legal principles that apply to prescriptive rights onto an intent-based retaliation protection.

Dotson attempts to sidestep the intent requirement by arguing that it was enough for the decision makers to know that Dotson was using vacation time to adopt a child, irrespective of whether the FMLA was in the picture. However, assuming the decision makers knew that Dotson was taking vacation to effect an adoption does **not** mean the decision makers knew that he had requested and was taking FMLA leave. Dotson ignores the fact that he certainly was not obligated by law to ask for FMLA leave and was free to use paid vacation to cover his adoption-related absences. Because Dotson never asked for FMLA leave and instead took paid vacation, it was impossible for Pfizer's decision makers to know of any exercise of FMLA rights by Dotson. Because the decision makers could not have

known or believed that Dotson exercised FMLA rights, they could not have been "motivated to retaliate by something unknown to [them]." *Brungart v. BellSouth Telecommc'ns, Inc.*, 271 F.3d 791, 799 (11th Cir. 2000).

In the decision below, the Fourth Circuit held Pfizer's decision makers liable because of evidence allegedly showing that a lower-level employee, Amy Burnell, misled Dotson regarding his FMLA rights. Appendix to Petition for Certiorari ("Pet. App.") at 5a, 11a; Res. Br. Opp. at 19. However, it is undisputed that none of the decision makers were aware of the conversation between Dotson and Burnell. Therefore, any knowledge of Burnell regarding her conversation with Dotson "cannot be imputed to the decision maker." *Corbitt v. Home Depot, U.S.A., Inc.*, 2009 WL 1981383, at *14, 106 Fair Empl. Prac. Cas. (BNA) 1249, 1260 (11th Cir. July 10, 2009) (quoting *Brungart*, 231 F.3d at 799-800).

Further, Dotson admitted at trial that he would not have taken unpaid FMLA leave over paid vacation even if Burnell had correctly explained his FMLA options. J.A. at 1211. Regardless, even if Dotson would have taken FMLA leave but for Burnell's allegedly improper advice, *Dotson's intent* or understanding of his FMLA rights is not a substitute for the *decision makers' intent*. *Cf. Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir. 1991) (stating that an employee's perception of himself and his performance is irrelevant because "what matters is the perception of the decision maker"); *Branson v. Price River Coal Co.*, 853 F.3d 768, 772 (10th Cir.

1988) (same); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986) (same); *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980) (same).[2] If that was not the case, then Pfizer's decision makers could be held liable for retaliation based on what they "should have known." Yet retaliation claims require *actual* knowledge by the decision makers. To hold decision makers liable for retaliation based on information they "should have known" is nothing more than an action for *negligent* retaliation—an oxymoron given decades of well-established principles under all federal employment discrimination statutes, including the FMLA.

2. As demonstrated by Dotson's Response, the Fourth Circuit's decision conflicts with other circuit courts by relying on evidence of alleged pretext even though Dotson failed to establish a *prima facie* case.

In order to establish a *prima facie* case of retaliatory discharge, a plaintiff must show that (1) he engaged in statutorily protected conduct; (2) he suffered an adverse employment action; and (3) there is a causal connection between the protected conduct and the adverse employment action. *Brungart*, 231 F.3d at 798 (noting that federal courts

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[2] Dotson argues that the animus of his supervisor, Chris Kennedy, should be imputed to the decision-making group. Res. Br. Opp. at 24-25. Kennedy had no authority to issue any discipline and was not part of the decision-making team. J.A. at 1709, 2160, 2275. In any case, like all other Pfizer supervisors and managers, any animus by Kennedy could not have been based upon illegal retaliatory intent because Dotson did not exercise rights under the FMLA.

apply the burden-shifting framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to FMLA retaliation claims). Once the plaintiff makes a *prima facie* case of retaliatory discharge, the burden shifts to the employer to articulate a legitimate non-retaliatory reason for the adverse employment action. *Corbitt*, 2009 WL 1981383, at *19, 106 Fair Empl. Prac. Cas. (BNA) at 1263-64. If the employer offers such a legitimate reason for the employment action, then the plaintiff must demonstrate that the employer's proffered explanation is a pretext for retaliation. *Id.*

It is well settled that evidence showing knowledge by the decision makers of plaintiff's protected status is an element of a *prima facie* case. *Brungart*, 231 F.3d at 799-800 (finding no *prima facie* case of retaliation under the FMLA where decision maker had no knowledge of protected activity); *see also Ney v. City of Hoisington*, 264 Fed. App'x 678, 682 (10th Cir. 2008); *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 90 (2d Cir. 2005); *Lubetsky v. Applied Card Sys., Inc.*, 296 F.3d 1301, 1307 (11th Cir. 2002); *Clover v. Total Sys., Inc.*, 176 F.3d 1346, 1356 (11th Cir. 1999); *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 582 (3d Cir. 1996).

Further, it is also well settled that whether an employer's stated reason for an adverse employment action is pretexual is not relevant if the plaintiff has failed to establish a *prima facie* case. *See Fedolfi v. Banyan Air Servs., Inc.*, 258 Fed. App'x 274, 277 n. 2 (11th Cir. 2007); *Plair v. E. J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); *cf. Wexler v.*

White's Fine Furniture, 317 F.3d 564, 574 (6th Cir. 2003).

In the decision below, the Fourth Circuit assumed that Dotson had established a *prima facie* case simply because Pfizer's decision makers knew that Dotson had taken a vacation to adopt a child. Based upon that assumption, the Fourth Circuit focused its analysis on whether there was evidence to support a conclusion that Pfizer's explanation for firing Dotson was pretextual. Pet. App. 16a - 19a. Similarly, Dotson's brief to this Court focuses on evidence of alleged pretext. Res. Br. Opp. at 3, 7, 8, 11, 13-15, 28-33.

It is undisputed that Dotson did not request FMLA leave and that the company did not designate Dotson's intermittent vacation leave as FMLA leave. Thus, Dotson cannot show that he exercised FMLA rights or that anyone at Pfizer had knowledge of Dotson exercising FMLA rights. Accordingly, Dotson failed to establish a *prima facie* case. Thus, whether Pfizer's stated reason for firing Dotson was pretextual is irrelevant. *See Brungart*, 231 F.3d at 799-800.

The decision by the Fourth Circuit creates a conflict with the Eleventh Circuit in *Brungart*. The plaintiff in *Brungart* was fired the day before she was scheduled to take FMLA leave. *Id.* at 794. Thus, the company in *Brungart* had knowledge of an actual FMLA leave requested and scheduled by the

plaintiff.[3] While it was undisputed that several company officials knew that the plaintiff had requested FMLA leave, the decision maker in *Brungart* testified that he had no knowledge of the plaintiff's request for FMLA leave or that FMLA leave had been scheduled. *Id.*

The Eleventh Circuit affirmed the dismissal of plaintiff's claim in *Brungart* on the grounds that a *prima facie* case cannot be established absent proof that the decision maker knew of the plaintiff's exercise of FMLA rights. *Id.* at 799-800. The Eleventh Circuit rejected the argument that knowledge by some corporate officials that Brungart had exercised FMLA rights could be imputed to the decision maker. *Id.* at 800. The court found that because the decision maker had no knowledge of Brungart's decision to take FMLA leave, the decision maker "could not have [terminated Brungart] on the corporation's behalf because of protected conduct." *Id.*

There is even less proof of a *prima facie* case in this matter than in *Brungart*. Unlike Dotson, the plaintiff in *Brungart* actually requested FMLA leave and was scheduled to take it. Here, Dotson intentionally saved company-paid vacation and requested use of that company-paid benefit to cover his adoption-related absences. J.A. at 1049.

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[3] In contrast, as previously explained, Pfizer could not have designated Dotson's intermittent vacation leave as actual FMLA leave unless Dotson had received notice from Pfizer and then agreed to the designation. *See supra* n. 1.

Further, in sharp contrast to the plaintiff in *Brungart*, neither Dotson, nor any other company official believed that Dotson was taking FMLA leave by traveling to Russia on two different occasions to adopt his child. *See De Hoyos v. Bristol Labs. Corp.*, 218 F. Supp. 2d 222, 226-27 (D.P.R. 2002) (finding no unlawful retaliation under the FMLA where plaintiff used accrued vacation to care for his mother absent evidence employer thought plaintiff was exercising FMLA rights when leave was taken). In fact, Dotson's counsel admitted during closing arguments that he was the first person to question whether Dotson had a proscriptive claim under the FMLA. This occurred **after** Dotson had been notified of his discharge during a meeting between Dotson and his counsel. J.A. at 2583, 2825.

In summary, there is no dispute that Pfizer's decision makers knew that Dotson had permission to go to Russia to adopt a child and used paid vacation to do so. There is also no dispute that Dotson's actual exercise of FMLA rights never entered the conscious mind of anyone at Pfizer, including Dotson, until after Dotson was discharged. Because allowing a retaliation claim under these circumstances would conflict with the distinction drawn by other circuits between prescriptive and proscriptive rights, along with settled requirements for proving a *prima facie* case, certiorari should be granted to resolve these serious circuit splits.

CONCLUSION

For the foregoing reasons, Pfizer respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

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